IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 17, 2008 Session

STATE OF TENNESSEE v. JOSHUA MEEKS

Appeal from the Criminal Court for Davidson County
No. 2006-B-1091 Steve Dozier, Judge

No. M2008-00556-CCA-R3-CD - Filed June 22, 2009

Appellant, Joshua Meeks, was convicted of conspiracy to deliver 300 pounds or more of marijuana and possession of more than 70.1 pounds of marijuana with the intent to deliver. He was sentenced to an effective sentence of thirty-four years. Appellant seeks review of the following issues on appeal: (1) whether the trial court erred in admitting evidence obtained via "intercepted communication" allegedly in violation of the Wiretapping and Electronic Surveillance Act of 1994; (2) whether the trial court erred in admitting evidence of prior crimes committed by Appellant; (3) whether the trial court properly instructed the jury; (4) whether the evidence was sufficient to sustain the convictions; (5) whether the sentence is excessive; (6) whether the trial court erred in denying the motion for judgment of acquittal; and (7) whether the trial court should have granted a mistrial after sua sponte increasing Appellant's bond from $40,000 to $250,000. We determine that Appellant is not entitled to relief from his convictions or sentence. Accordingly, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Dominic J. Leonardo, Nashville, Tennessee, for the appellant, Joshua Meeks.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General, and John Zimmerman and Bryan Stepehenson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Twentieth Judicial District Drug Task Force in Davidson County began an investigation in 2005 of a suspected drug dealer named Larry "The Living Legend" Reed. As part of the

investigation, the members of the task force initiated a wiretap pursuant to the Wiretapping and Electronic Surveillance Act of 1994. Authorities tapped the phone of Mr. Reed, the target, and were able to identify several other suspects, including Appellant and Oscar Chavez. The Task Force started monitoring a phone registered to "Joe Lopez" and used by Appellant on August 30, 2005. The Task Force also monitored a phone registered to "Sam Smith" that was being used by Mr. Chavez.

As a result of listening to intercepted communications between Appellant and Mr. Chavez, the authorities were able to witness a meeting between Appellant and Mr. Chaves at an empty house on Kentucky Avenue in Nashville. The house was owned by Appellant's mother. The phone calls regarding this meeting indicated that it was set up so that Mr. Chavez could collect money from Appellant. During the meeting, authorities were able to place a "bird dog" surveillance device on the truck driven by Mr. Chavez. The vehicle was traced to a location in Texas.

Around September 9 or 10, 2005, authorities intercepted communications between Appellant and Mr. Chavez indicating another meeting between the two men was to take place on September 12, 2005. With the assistance of the Tennessee Bureau of Investigation ("TBI"), surveillance was set up at Appellant's home in White Bluff, Tennessee, in Dickson County.

On September 12, Appellant left his residence driving a Buick Riviera. He was followed by authorities in cars and a helicopter. Appellant exited I-40 in Davidson County at the Bellevue Exit. Appellant was seen turning into the parking lot at O'Charley's Restaurant. Appellant exited the car and walked into the restaurant. The truck driven by Mr. Chavez was also traveling east on I-40, where it exited the Interstate and pulled into a gas station adjacent to the restaurant. The truck was accompanied by an Adame bus, a bus line primarily used by Hispanics that operates between Texas and several southern states.[1]

The authorities intercepted a telephone call from Mr. Chavez to Appellant asking for the location of the keys to the car. Shortly thereafter, Mr. Chavez drove Appellant's car to a nearby gas station where he parked the car behind the building with the bus. Officers observed several men transferring items from the luggage compartment of the bus to Appellant's car. Mr. Chavez then returned Appellant's car to the parking lot of the restaurant.

At that time, Mr. Chavez attempted to call Appellant. It appeared to authorities that Mr. Chavez had a package under his shirt. When Mr. Chavez was unable to complete the call, he returned the package to the Buick. While Mr. Chavez remained outside the restaurant, Appellant was inside the restaurant having lunch with a man named Michael Collins.

Appellant paid for his lunch and exited the restaurant with Mr. Collins. Appellant and Mr. Collins were placed under arrest as they tried to leave the area. Mr. Chavez was also arrested. He showed officers where he had hidden the keys to the Buick in a bush outside the restaurant.

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[1] The bus contained no passengers.

When the authorities searched the Buick, they found three duffle bags containing a combined total of 170.8 pounds of marijuana. They also recovered the bag that Mr. Chavez left in the floorboard of the vehicle. It contained $41,000 in cash. The car also contained several bank deposit slips that indicated transfers of $1,900 to an account in the name of Mr. Chavez's wife. It was later verified that the cell phone used by Appellant was the cell phone that authorities had tapped.

Sergeant James McWright, the Director of the Task Force, observed the events of September 12. When Appellant was taken into custody, TBI Agent Steve Talley explained to Appellant that the officers had procured a search warrant for his residence in Dickson County. Appellant waived his *Miranda* rights and gave consent for the officers to search his residence. Appellant accompanied the officers to the residence and was able to tell them where some illegal items were located. During the search, authorities seized $1,670 from the pocket of a jacket and several vacuum sealed bags of marijuana. Authorities also seized two vacuum sealing machines, a set of scales, plastic bags, a pistol with two clips of ammunition, a Tupperware container filled with pre-rolled marijuana cigarettes, a box top covered with loose marijuana, and 19.1 pounds of marijuana. Appellant was also in possession of several more deposit slips that indicated at least $3,000 in deposits to accounts in the names of Mr. Chavez's wife and daughter.

As part of the investigation, authorities also searched the truck belonging to Mr. Chavez. They recovered a laptop computer and a personal planner. Inside the planner the authorities located bank account numbers that matched account numbers on deposit slips that were in Appellant's possession.

The Davidson County Grand Jury indicted Appellant on May 5, 2006, for one count of conspiracy to deliver 300 pounds or more of marijuana and one count of possession of more than 70.1 pounds of marijuana with the intent to deliver.

At trial, the jury heard the testimony of TBI Agent Tim Hawn. During the search of Appellant's residence, Agent Hawn complimented Appellant on some of the remodeling that had been done on the home. Agent Hawn asked Appellant if he remodeled homes for a living. Appellant informed Agent Hawn that he had helped others with remodeling in the past but that he did not remodel homes as a profession. Agent Hawn then asked Appellant if his "only job [wa]s to sell marijuana?" Appellant replied, "I do pretty good." When asked later about his employment status, Appellant described himself as unemployed.

Appellant was also asked at his arrest if had ever received a shipment of marijuana as large as the shipment seized on September 12, 2005. Sergeant Mark Chestnut testified that Appellant informed him that he had received two shipments earlier that year but that they likely totaled less than two hundred pounds when combined.

Mr. Chavez testified at trial that he came to Nashville on September 12, 2005, to deliver marijuana to Appellant. Mr. Chavez lived in Houston, Texas at the time and worked for a man named Fransisco Silva, who operated out of Mexico. Mr. Chavez testified that he called Appellant

several days prior to September 12 to arrange the delivery at the O'Charley's Restaurant. The men had met once before at this location. Mr. Chavez arranged for Vincinte Orozco and Hector Pena to drive the Adame bus from Houston to Nashville with marijuana hidden inside the walls of the luggage compartment. Mr. Chavez drove to Nashville in his truck accompanied by Ricardo Guerra.

Mr. Chavez and Appellant had met as many as five times prior to September 12, 2005. Mr. Chavez picked up money from Appellant on each of these occasions, one time as much as $50,000. Mr. Chavez confirmed during his testimony that he asked Appellant to deposit money into his wife's account and his daughter's account in order to cover his expenses. Mr. Chavez also estimated that he made deliveries of marijuana to Appellant at least twice a month both in Nashville and at Appellant's Dickson County residence.

At the conclusion of the trial, the jury convicted Appellant as charged in the indictment.

After a sentencing hearing, the trial court sentenced Appellant to an effective sentence of thirty-four years. Appellant filed a motion for new trial, which was denied by the trial court. On appeal, Appellant argues that: (1) the trial court erred in admitting evidence obtained via "intercepted communication" in violation of the Wiretapping and Electronic Surveillance Act of 1994; (2) the trial court erred in admitting evidence of prior crimes committed by Appellant; (3) the trial court improperly instructed the jury regarding conspiracy; (4) the evidence was insufficient to sustain the convictions; (5) the sentence is excessive; (6) the trial court erred in denying the motion for judgment of acquittal; and (7) the trial court should have granted a mistrial because the trial court sua sponte increased Appellant's bond.

Analysis

Admission of Evidence Obtained by Wiretap

Appellant complains that the trial court improperly admitted evidence that was "obtained via intercepted communication in violation of the 'Wiretapping and Electronic Surveillance Act of 1994.'"[2] Specifically, Appellant complains that the original application for the wiretap surveillance was based upon speculation of cocaine distribution among suspects and that the evidence obtained as a result of the wiretap was inadmissible because no cocaine was found as a product of the wiretap. Further, Appellant contends that the Task Force "did not have the requisite probable cause or evidence acquired to sustain an application for a warrant based on speculation of marijuana distribution." The State, on the other hand, argues that Appellant waived the issue for failure to file a motion to suppress the evidence, to object to the admission of the testimony obtained by the wiretap at trial, or to include the warrant and/or affidavit used to procure the wiretap with the appellate record.

[2] The Act allows certain judges to issue orders authorizing interception of wire, oral, or electronic communication upon the application of law enforcement. T.C.A. § 40-6-304.

Initially, as pointed out by the State, we note that the record on appeal does not contain the warrant or affidavit that was used to procure the wiretap. It is the burden of the appellant to prepare an adequate record for our review. Tenn. R. App. P. 24(b). ("[T]he appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal."). In addition, when a record is not complete and does not contain relevant information, this Court must presume that the trial court was correct in its ruling. *See State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993); *State v. Cooper*, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987).

Further, Tennessee Rule of Criminal Procedure 12 requires that a motion to suppress the evidence be made before trial. Tenn. R. Crim. P. 12(b)(2)(C). The record herein does not contain a motion to suppress the evidence. According to Tennessee Rule of Criminal Procedure 12(f), "[u]nless the court grants relief for good cause, a party waives any defense, objection, or request by failing to comply with: (1) rules requiring such matters to be raised pretrial, ..." Appellant did not file a pretrial motion to suppress the wiretap.

Finally, Appellant did not object to the introduction of the evidence prior to the motion for new trial. Tennessee Rule of Appellate Procedure 36(a) states that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." The failure to object, request a curative instruction or move for a mistrial is typically grounds for waiver of an issue on appeal. *State v. Walker*, 910 S.W.2d 381, 386 (Tenn. 1995). "When a party does not object to the admissibility of evidence, though, the evidence becomes admissible notwithstanding any other Rule of Evidence to the contrary, and the jury may consider that evidence for its 'natural probative effects as if it were in law admissible.'" *State v. Smith*, 24 S.W.3d 274, 280 (Tenn. 2000) (quoting *State v. Harrington*, 627 S.W.2d 345, 348 (Tenn. 1981)). Consequently, because Appellant failed to file a motion to suppress the wiretap prior to trial, failed to object to the introduction of the testimony at trial, and failed to include the wiretap itself in the record on appeal, this issue is waived. Appellant is not entitled to relief on this issue.

Introduction of Evidence Seized From Search of Appellant's Residence

Next, Appellant complains that the trial court allowed introduction of evidence regarding contraband that was seized during the search of his residence. Appellant argues that he objected to the introduction of the evidence on the basis of Tennessee Rule of Evidence 404(b) in that it was more prejudicial than probative. Further, Appellant argues that the evidence was not relevant. The State contends that the trial court properly admitted the evidence "because it was relevant evidence of the charged offenses as well as evidence of [Appellant's] intent."

As we begin our analysis, we note well-established precedent providing "that trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of that discretion." *State v. McLeod*, 937 S.W.2d 867, 871 (Tenn. 1996). Moreover, the Tennessee Rules of Evidence embody, and our courts traditionally have acknowledged, "a policy

of liberality in the admission of evidence in both civil and criminal cases . . . ." *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978); *see also State v. Robinson*, 930 S.W.2d 78, 84 (Tenn. Crim. App. 1995). To be admissible, evidence must satisfy the threshold determination of relevancy mandated by Rule 401 of the Tennessee Rules of Evidence. *See, e.g., Banks*, 564 S.W.2d at 949. Rule 401 defines "relevant evidence" as being "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Tenn. R. Evid. 403; *see also Banks*, 564 S.W.2d at 951. A trial court abuses its discretion in regards to the admissibility of evidence only when it "applie[s] an incorrect legal standard, or reach[es] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)).

The general rule is that evidence of a defendant's prior conduct is inadmissible, especially when previous crimes or acts are of the same character as the charged offense, because such evidence is irrelevant and "invites the finder of fact to infer guilt from propensity." *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). Tennessee Rule of Evidence 404(b) permits the admission of evidence of prior conduct if the evidence of other acts is relevant to a litigated issue such as identity, intent, or rebuttal of accident or mistake, and the probative value outweighs the danger of unfair prejudice. Tenn. R. Evid. 404(b), Advisory Comm'n Cmts.; *See State v. Parton*, 694 S.W.2d 299, 303 (Tenn. 1985); *State v. Hooten*, 735 S.W.2d 823, 824 (Tenn. Crim. App. 1987). However, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). Before admitting evidence under Rule 404(b), the rule provides that (1) upon request, the court must hold a hearing outside the jury's presence; (2) the court must determine that the evidence is probative on a material issue and must, if requested, state on the record the material issue and the reasons for admitting or excluding the evidence; (3) the court must find proof of the other crime, wrong, or act to be clear and convincing; and (4) the court must exclude the evidence if the danger of unfair prejudice outweighs its probative value. Tenn. R. Evid. 404(b).

The rationale underlying Rule 404(b)'s exclusion of evidence of a defendant's prior bad acts is that admission of such evidence carries with it the inherent risk of the jury convicting the defendant of a crime based upon his bad character or propensity to commit a crime, rather than the conviction resting upon the strength of the evidence. *State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994). The risk is greater when the defendant's prior bad acts are similar to the crime for which the defendant is on trial. *Id.*; *see also State v. McCary*, 922 S.W.2d 511, 514 (Tenn. 1996).

At trial, Sergeant McWright testified that several items were seized as a result of the execution of a search warrant at Appellant's residence. Counsel for Appellant objected to the introduction of this evidence, arguing that it violated Tennessee Rule of Evidence 404(b). The trial court held a jury out hearing on the matter at the conclusion of which the trial court determined that the evidence was relevant "especially" to the conspiracy charge. Specifically, the trial court ruled:

> Is it prejudicial? Sure. But, that probative value that the Court - - - has already discussed in terms of the intent and proving the elements in both of these counts, is something the State is required to do. Just because it's found in another county does not affect its admissibility, if it otherwise qualifies under 404(b) or . . . even if it is 404(b) type conduct, rather than just conduct in and of itself as to Count One.
>
> But, 404(b) conduct can be admitted if those factors are analyzed and deemed more probative . . . the probative value not being outweighed by its unfair prejudice.
>
> It is highly probative, not unfairly prejudicial because it goes to the very elements of the two crimes charged.

At that time, the trial court overruled the objection to the admissibility of the items seized as a result of the search. The trial court also offered to give the jury a limiting instruction that they were not to consider any additional charges that may or may not have resulted from the search of Appellant's residence, but that they could consider the evidence seized to show Appellant's intent or plan to be involved in the conspiracy.

Appellant has failed to show this Court how the seizure of the evidence from his home is evidence of other prior bad acts. The evidence seized, i.e. vacuum sealers, scales, plastic bags, deposit slips, cash, and marijuana, was relevant to establish the existence of a conspiracy to deliver marijuana, the very crime for which Appellant was on trial. Further, we agree that the trial court properly determined that the purpose of the evidence was to demonstrate Appellant's intent to enter into a conspiracy. The trial court did not abuse its discretion in admitting the evidence. Appellant is not entitled to relief on this issue.

Jury Instructions

Next, Appellant argues that the trial court erred by refusing to instruct the jury as to the definition of the word "another" as it appeared in the indictment alleging conspiracy and that the trial court erred by refusing to instruct the jury that it was "incumbent on the State to prove that [Appellant] had conspired with 'another.'" Specifically, Appellant insists that because the indictment alleged that Appellant "did knowingly agree and conspire *with another*," the trial court had to instruct the jury with the actual meaning of the word "another" and the trial court had to inform the jury that it was the State's burden to prove that Appellant acted with "another," other than those named in the indictment. Appellant claimed this was a greater burden than that created by the

statutory definition of a conspiracy. The State contends that the trial court properly instructed the jury.[3]

The indictment charging Appellant, Mr. Chavez, Ricardo Moses Guerra, Vicente Gomez Orozco, and Hector Diaz Pena with conspiracy to delivery 300 pounds or more of marijuana reads as follows:

> [Defendants] did knowingly agree and conspire *with another* that one or more of them would engage in conduct that constitutes the offense of delivery of three hundred pounds or more of marijuana, a Schedule VI controlled substance, with each having the culpable mental state required for the commission of that offense, and with each acting for the purpose of promoting or facilitating the commission of the offense, and in furtherance of the conspiracy did engage in one or more of the following overt acts:
>
> 1. Defendants Hector Diaz Pena and Vicente Gomez Orozco traveled to Nashville in a bus marked Adame Bus to transport the drugs;
>
> 2. Defendant [Appellant] went to O'Charley's restaurant to arrange delivery of the drugs; and
>
> 3. Defendant Oscar Humberto Chavez received the drugs transported on the said bus.
>
> Wherefore, [Defendants] did conspire to violate Tennessee Code Annotated § 39-17-417(j) in violation of Tennessee Code Annotated § 39-17-417, and the defendants acted against the peace and dignity of the State of Tennessee.

(emphasis added).

At the conclusion of trial, Counsel for Appellant filed a special request for a jury instruction seeking to have the trial court provide the jury with the definition of "another." Counsel for Appellant argued that the State was taking on a greater burden by alleging that the codefendants conspired "with another" and, therefore, the word could not be surplusage. The State objected to the inclusion of the definition of "another" but agreed with the trial court that the language was not in the statute

[3] The State initially argued that Appellant waived the issue for failure to include the jury instructions in the record on appeal. After the filing of the State's brief, Appellant sought leave with this Court to supplement the record with the jury instructions. This Court granted Appellant's request and the trial court submitted the jury instructions for inclusion in the record on appeal.

or the jury instructions.[4] Counsel for the State argued that the word was "surplusage" and "not an element of the crime" that the jury had to decide. The trial court ruled that the pattern jury instruction for conspiracy would adequately set out the elements of the crime and what the State was required to prove. Further, the trial court commented that "with another" could be viewed as meaning "amongst each other" rather than with another person other than those named in the indictment, as alleged by Appellant.

The trial court charged the jury with the Pattern Jury Instruction on conspiracy, 4.03, as follows:

> Any person who conspires to commit an offense is guilty of a crime.
>
> For you to find the defendant guilty of criminal conspiracy, the state must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> > (1) that the defendant entered into an agreement with one (1) or more people to commit the offense of delivery of three hundred pounds (300 lbs.) or more of a substance containing Marijuana, a Schedule VI Controlled Substance. It is not necessary that the object of the agreement be attained.
> >
> > and
> >
> > (2) that each of the parties to the conspiracy had the intent to commit the offense of delivery of three hundred pounds (300 lbs.) or more of a substance containing Marijuana, a Schedule VI Controlled Substance.
> >
> > and
> >
> > (3) that each party acting for the purpose of promoting or facilitating the commission of the offense of delivery of three hundred pounds (300 lbs.) or more of a substance containing Marijuana, a Schedule VI Controlled Substance, agreed that one (1) or more of them would engage in conduct which constitutes the offense of delivery of three hundred pounds (300 lbs.) or more of a substance containing Marijuana, a Schedule VI Controlled Substance;
> >
> > and
> >
> > (4) that one (1) of the parties to the conspiracy committed an overt act in furtherance of the conspiracy. An overt act is an act done by one

[4] Tennessee Code Annotated section 39-12-103(a) requires the State to prove that:

> [T]wo (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.

> of the parties to carry out the intent of the conspiracy and it must be a step toward the execution of the conspiracy.
>
> Conspiracy is a continuing course of conduct which terminates when the objectives of the conspiracy are completed or the agreement that they be completed is abandoned by the person and by those with whom the person conspired. The objectives of the conspiracy include but are not limited to, escape from the offense, distribution of the proceeds of the offense, and measures, other than silence, for concealing the crime or obstructing justice in relation to it.
>
> Mere presence at the scene of an alleged transaction or event, mere association with persons involved in a criminal enterprise, or mere similarity of conduct among various persons and the fact that they must have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

A trial court has a "duty to give a complete charge of the law applicable to the facts of the case." *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). Anything short of a complete charge denies a defendant his constitutional right to trial by a jury. *State v. McAfee*, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). However, Tennessee law does not mandate that any particular jury instructions be given so long as the trial court gives a complete charge on the applicable law. *See State v. West*, 844 S.W.2d 144, 151 (Tenn. 1992). A charge is prejudicial error "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997) (citing *State v. Forbes*, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995); *Graham v. State*, 547 S.W.2d 531 (Tenn. 1977)). Erroneous jury instructions require a reversal, unless the error is harmless beyond a reasonable doubt. *See Welch v. State*, 836 S.W.2d 586, 590 (Tenn. Crim. App. 1992). Further, "[w]here words and terms are in common use and are such as can be understood by persons of ordinary intelligence, it is not necessary, in the absence of anything in the charge to obscure their meaning, for the court to define or explain them." *State v. Summers*, 692 S.W.2d 439, 445 (Tenn. Crim. App. 1985) (citing *Robinson v. State*, 513 S.W.2d 156, 158 (Tenn. Crim. App. 1974)).

Moreover, an indictment is not fatal because of the inclusion of surplusage if, after eliminating the surplusage, the offense is still sufficiently charged. *State v. Culp*, 891 S.W.2d 232, 236 (Tenn. Crim. App. 1994). The indictment herein sufficiently charges the statutory elements of conspiracy to deliver more than 300 pounds of marijuana even after removal of the surplus words "with another," and includes an appropriate citation to the statute. *See State v. Griffis*, 964 S.W.2d 577, 591 (Tenn. Crim. App. 1997). "As a general rule, it is sufficient to state the offense charged in the words of the statute, or words which are the equivalent to the words contained in the statute." *Id.* (footnotes omitted). We conclude that the trial court did not err in refusing to instruct the jury

with the definition of "another" or in refusing to hold the State to a higher burden as a result of the inclusion of the words "with another" in the indictment. The indictment fairly described the offense and the elements that the State had to prove beyond a reasonable doubt. Further, the trial court's jury instructions reflected a complete charge of the applicable law. *See West*, 844 S.W.2d at 151. Appellant is not entitled to relief on this issue.

Mistrial

Appellant contends that the trial court should have granted a mistrial on the basis that the trial court sua sponte increased Appellant's bond from $40,000 to $250,000 during the trial. Specifically, Appellant argues that the trial court's actions "showed the Court's bias as thirteenth juror and effectively denied [Appellant] the right to a fair and impartial thirteenth juror as well as his procedural due process rights as they pertain to bail bonds and other conditions." According to Appellant, by setting the bond amount above $75,000, the trial court ensured that Appellant would not have the opportunity to have a source hearing before the jury returned with their verdict. This had the effect of setting an excessive bond. Further, Appellant argues that bond can only be changed by written motion, pursuant to Tennessee Code Annotated section 40-11-143. The State disagrees, arguing that no mistrial was necessary, that Appellant has not actually challenged the amount of the bond and "provides no authority suggesting that an alleged error in modifying bond can be used to establish a trial court's bias."

At trial, the trial court felt "compelled", after hearing the proof, to increase Appellant's bond from $40,000 to $250,000. The trial court explained that the proof at trial differed from Appellant's original charge by warrant in September of 2005 alleging that Appellant engaged in a conspiracy to possess 138 pounds of marijuana. This charge was the basis for the $40,000 bond. The trial court noted that the original charge was "totally different" than the indictment and felt that the current bond was "not sufficient" after hearing the testimony of Mr. Chavez that Appellant was "paying out thirty to fifty thousand dollars, maybe once a month, maybe more than once a month, and receiving two hundred, hundred eighty, hundred fifty pounds of marijuana twice a month." The trial court found that information "shocking" and wanted to ensure Appellant's attendance at trial. Counsel for Appellant asked the trial court to recuse itself and for a mistrial. The trial court denied the requests and informed counsel that he could put on proof regarding the increased bond.

A. Sua Sponte Bond Increase

Appellant first complains that the trial court sua sponte increased his bond from $40,000 to $250,000 during trial after hearing the evidence provided by the State's witnesses. According to Tennessee Code Annotated section 40-11-141:

> A defendant released before trial shall continue on release during the trial under the same terms and conditions as were previously imposed, unless the court determines

pursuant to § 40-11-137[5] or § 40-11-144[6] that other terms and conditions or termination of release are necessary to assure the defendant's presence during trial, or to assure that the defendant's conduct will not obstruct the orderly and expeditious progress of the trial.

During the trial herein, the trial court increased Appellant's bond after hearing the testimony of the State's witnesses in order to ensure Appellant's continued attendance at trial. Tennessee Rule of Appellate Procedure 8 requires a defendant to file a written motion in the trial court describing the relief sought regarding the alteration of the conditions of a defendant's release as a prerequisite to review *prior* to conviction. In *State v. Melson*, 638 S.W.2d 342 (Tenn. 1982), the Tennessee Supreme Court determined that the defendant's only effective remedy to challenge bail set at $200,000 was to follow Rule 8 of the Tennessee Rules of Appellate Procedure promptly after bail was set as opposed to waiting until after conviction. *Id*. at 358. The court stated that the defendant:

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[5] Tennessee Code Annotated section 40-11-137 is entitled "Duty of bail bondsmen or surety upon surrendering defendant - Hearing -." It provides:

> (a) Upon surrendering the defendant, the bail bondsman or surety shall, as soon as is reasonably practicable, go before any court having jurisdiction authorized to admit to bail, and notify the officer of the surrender.
>
> (b) Any court having jurisdiction so notified shall have the defendant brought before it as soon as practicable, and within seventy-two (72) hours, and determine whether or not the surrender was for good cause.
>
> (1) If the court having jurisdiction finds that the surrender was arbitrary or not for good cause, it may order the defendant rereleased upon the same undertaking or impose other conditions as provided by law.
>
> (2) If the surrender is found to be for good cause, the court having jurisdiction shall approve the surrender by endorsement upon the bail bond or by other writing, and it shall be the duty of the surrendering bail bondsman to deliver the written approval or copy of the approval to the sheriff.
>
> (c) The court shall fix the amount of premium to be refunded, if any.

[6] Tennessee Code Annotated section 40-11-144, entitled "Review of release decision" provides:

> (a) The actions by a trial court from which an appeal lies to the supreme court or court of criminal appeals in granting, denying, setting or altering conditions of the defendant's release shall be reviewable in the manner provided in the Tennessee Rules of Appellate Procedure.
>
> (b) If the action to be reviewed is that of a court from which an appeal lies to a court inferior to the supreme court or court of criminal appeals, review shall be sought in the next higher court upon writ of certiorari.

> [G]ains nothing by appealing the amount of bail [after his conviction]. There is no ground for holding that the amount at which bail was set, even if it were excessive, more probably than not affected the outcome of the case. The appeal of this issue at this point is of no practical effect or benefit to the defendant.

Id. The analysis in *Melson* is applicable herein. Appellant did not seek a review of the trial court's decision until after his conviction. Even if the trial court had set an excessive bond, the matter became moot upon Appellant's conviction. This issue is waived.

B. Mistrial

The purpose of a mistrial is to correct the damage done to the judicial process when some event has occurred which would preclude an impartial verdict. *See Arnold v. State*, 563 S. W.2d 792, 794 (Tenn. Crim. App. 1977). The decision whether to grant a mistrial is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (citing *State v. Hall*, 667 S.W.2d 507, 510 (Tenn. Crim. App. 1983)). For this reason, an appellate court's review should provide considerable deference to the trial court's ruling in determining whether an occurrence or event at trial has so prejudiced the defendant or the State as to preclude a fair and impartial verdict. *See State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

In determining whether there is a "manifest necessity" for a mistrial, "'no abstract formula should be mechanically applied and all circumstances should be taken into account.'" *State v. Mounce*, 859 S.W.2d 319, 322 (Tenn. 1993) (quoting *Jones v. State*, 403 S.W.2d 750, 753 (Tenn. 1966)). Only when there is "no feasible alternative to halting the proceedings" can a manifest necessity be shown. *State v. Knight*, 616 S.W.2d 593, 596 (Tenn. 1981). We fail to see how an increase in bond would create a manifest necessity requiring a mistrial. The increase in bond did not "preclude a fair and impartial verdict." *Williams*, 929 S.W.2d at 388. Appellant is not entitled to relief on this issue.

C. Recusal

When deciding whether to grant a motion for recusal, a trial judge exercises his or her discretion. *Caruthers v. State*, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). This Court may reverse the trial judge's decision only when the judge has clearly abused that discretionary authority. *State v. Cash*, 867 S.W.2d 741, 749 (Tenn. Crim. App. 1993). The judge should recuse himself or herself whenever the judge's "impartiality [could] reasonably be questioned." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994) (quoting Code of Judicial Conduct, Canon 3(c) (now part of Tenn. Sup. Ct. R. 10, Canon 3(E)(1)). Furthermore, recusal is appropriate "when a person of ordinary prudence in the judge's position . . . would find a reasonable basis for questioning the judge's impartiality." *Id.* (footnote omitted). The trial judge must determine whether he or she has a subjective bias against the defendant and whether the trial judge's impartiality could reasonably be

questioned under an objective standard. *State v. Connors*, 995 S.W.2d 146, 148 (Tenn. Crim. App. 1998).

The trial judge denied Appellant's motion for recusal herein after engaging in this two-prong analysis. He determined that he had neither a subjective bias nor an objective appearance of bias and could therefore continue the trial with impartiality. As the motion for recusal was based on the increase in Appellant's bond after hearing the proof against Appellant, he was required to grant the motion for recusal if his opinion as to Appellant's guilt would affect his impartiality.

The trial judge stated that he did not care about the outcome of the trial and trusted that the jury would adequately assess the proof against Appellant but felt that the proof as presented to the jury justified the increase of the bond. Therefore, the trial judge did not appear to have based his decision on a subjective bias. Thus, we conclude that the trial judge properly exercised his discretion when denying the motion for recusal and, therefore, hold that this issue lacks merit.

Sufficiency of the Evidence/Denial of Motion for Judgment of Acquittal

Appellant argues that the evidence was insufficient to sustain the jury's verdict of guilt for conspiracy to deliver 300 pounds or more of marijuana. Specifically, Appellant argues that there was no evidence, "outside the testimony of Co-Defendant Chavez," that Appellant possessed more than 300 pounds of marijuana and that there was no evidence that Appellant's possession of the marijuana occurred between the dates specified in the indictment. In a related issue, Appellant argues that the trial court improperly denied the motion for judgment of acquittal made at the close of the State's proof. Specifically, Appellant argues that there was no proof that the five individuals named in the indictment agreed to conspire with "another," there was no proof that 300 pounds or more of marijuana was delivered in the time framed alleged in the indictment, and there was no proof that Appellant went to the O'Charley's to arrange a delivery of drugs. With respect to Count Two, Appellant argues that there was never any proof that Appellant possessed marijuana on September 12. The State disagrees, arguing that the evidence was sufficient to support both convictions.

According to Tennessee Rule of Criminal Procedure 29(b):

> On defendant's motion on its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has noted that "[i]n dealing with a motion for judgment of acquittal, unlike a motion for a new trial, the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence." *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction

has been imposed. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *see also State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995).

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R.App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reevaluating the evidence when considering the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

A. Conspiracy to Deliver 300 Pounds or More of Marijuana

Appellant was convicted in Count One of Conspiracy to Deliver 300 pounds or more of marijuana. In order to sustain a conspiracy conviction, Tennessee Code Annotated section 39-12-103(a) requires the State to prove that:

> [T]wo (2) or more people, each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.

T.C.A. § 39-12-103(a). The remaining pertinent portion of this statute provides that "[n]o person may be convicted of conspiracy to commit an offense, unless an overt act in pursuance of the conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired." T.C.A. § 39-12-103(d).

Instead of arguing that the State failed to prove every element of the offense, Appellant argues on appeal that he was convicted by the uncorroborated testimony of an accomplice, Mr. Chavez. We agree with Appellant that convictions may not be based solely upon the uncorroborated

testimony of accomplices. *See State v. Robinson*, 971 S.W.2d 30, 42 (Tenn. Crim. App. 1997). However, Tennessee law requires only a modicum of evidence in order to sufficiently corroborate such testimony. *See State v. Copeland*, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984). More specifically, precedent provides that:

> The rule of corroboration as applied and used in this State is that there must be some evidence independent of the testimony of the accomplice. The corroborating evidence must connect, or tend to connect the defendant with the commission of the crime charged; and, furthermore, the tendency of the corroborative evidence to connect the defendant must be independent of any testimony of the accomplice. The corroborative evidence must[,] of its own force, independently of the accomplice's testimony, tend to connect the defendant with the commission of the crime.

Griffis, 964 S.W.2d at 588-89 (quoting *Sherrill v. State*, 321 S.W.2d 811, 815 (Tenn. 1959)). In addition, our courts have stated that:

> The evidence corroborating the testimony of an accomplice may consist of direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. The quantum of evidence necessary to corroborate an accomplice's testimony is not required to be sufficient enough to support the accused's conviction independent of the accomplice's testimony nor is it required to extend to every portion of the accomplice's testimony. To the contrary, only slight circumstances are required to corroborate an accomplice's testimony. The corroborating evidence is sufficient if it connects the accused with the crime in question.

Griffis, 964 S.W.2d at 589 (footnotes omitted). Furthermore, we note that the question of whether an accomplice's testimony has been sufficiently corroborated is for the jury to determine. *See id.* at 588; *State v. Maddox*, 957 S.W.2d 547, 554 (Tenn. Crim. App. 1997).

The proof at trial, when viewed in a light most favorable to the State, establishes that Appellant met on several occasions with Mr. Chavez to discuss marijuana shipments. Mr. Chavez testified at trial that he had delivered marijuana twice a month to Appellant for more than a year in amounts similar to those seized during the sting operation. Appellant's car contained deposit slips to bank accounts that were registered in the names of Mr. Chavez's wife and daughter. Further, police had listened to wiretaps of the conversations between Appellant and Mr. Chavez during which they set up meetings. Finally, the members of the Drug Task Force and other law enforcement personnel actually observed the transaction that took place at O'Charley's and did not contradict Mr. Chavez's account of the event. The actions of Appellant were corroborated by physical evidence

and observations made by individuals other than Mr. Chavez. Appellant is not entitled to relief on this issue.[7]

B. Possession of 70 Pounds of More of Marijuana With Intent to Deliver

Appellant was also convicted of possession of more than 70 pounds of marijuana with the intent to deliver. Appellant argues that the trial court improperly denied the motion for judgment of acquittal with respect to this conviction because there was no proof that he actually possessed any marijuana on the day of the take down.

In order to sustain a conviction for possession of more than 70 pounds of marijuana with the intent to deliver, the State had to prove that Appellant knowingly "[p]ossess[ed] a controlled substance with the intent to manufacture, deliver or sell the controlled substance." T.C.A. § 39-17-417(a)(4). "[A] person . . . acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." T.C.A. § 39-11-302(b). A conviction for possession of marijuana may be based upon either actual or constructive possession. *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001); *State v. Brown*, 823 S.W.2d 576, 579 (Tenn. Crim. App. 1991); *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). "Before a person can be found to constructively possess a drug, it must appear that the person has 'the power and intention at any given time to exercise dominion and control over . . . [the drugs] either directly or through others.'" *Id. (citing State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981); *See also State v. Patterson*, 966 S.W.2d 435, 445 (Tenn. Crim. App. 1997) (quoting *United States v. Craig*, 522 F.2d 29 (6 Cir. 1975))). The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs. *Id.* However, as stated above, circumstantial evidence alone may be sufficient to support a conviction. *State v. Tharpe*, 726 S.W.2d 896, 899-900 (Tenn. 1987); *State v. Gregory*, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). The circumstantial evidence "'must be not only consistent with the guilt of the accused but it must also be inconsistent with innocence and must exclude every other reasonable theory or hypothesis except that of guilt, and it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime.'" *Tharpe*, 726 S.W.2d at 900 (quoting *Pruitt v. State*, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970)). Further, it is permissible for the jury to draw an inference of intent to sell or deliver when the amount of the controlled substance and other relevant facts surrounding the arrest are considered together. T.C.A. § 39-17-419; *see also State v. Willie Earl Kyles, Jr.*, No. W2001-01931-CCA-R3-CD, 2002 WL 927604, at *2 (Tenn. Crim. App., at Jackson, May 3, 2002), *perm. app. denied*, (Tenn. Oct. 21, 2002) (concluding that jury could infer possession of drugs with intent to sell or deliver from amount of drugs and circumstances surrounding arrest of defendant); *State v. James R. Huntington*, No. 02C01-9407-CR-00149, 1995

[7] Appellant also contends that the trial court improperly denied the motion for judgment of acquittal with respect to this conviction because there was no proof that the named individuals conspired with "another" person, as stated in the indictment. Because we have already determined that this language in the indictment was mere surplusage, Appellant is not entitled to relief on this issue.

WL 134589, at *3-4 (Tenn. Crim. App., at Jackson, Mar. 29, 1995), *perm. app. denied*, (Tenn. July 10, 1995) (determining that jury could infer intent to sell marijuana primarily from large quantity of marijuana in defendant's possession).

In the case herein, the evidence established that Appellant left the keys to his Buick for Mr. Chavez in the parking lot at the O'Charley's restaurant. When Mr. Chavez arrived, he located the keys in the nearby bushes and placed the marijuana in the car as he had discussed with Appellant. Appellant was the owner of the car. Lab results confirmed that the marijuana weighed more than 170 pounds. This evidence supports the jury's conclusion that Appellant knowingly possessed marijuana that weighed more than 70 pounds with the intent to deliver. Appellant is not entitled to relief on this issue.

Sentencing

Lastly, Appellant complains about his sentence. Specifically, Appellant complains that his sentence is excessive, the trial court improperly ordered consecutive sentencing, the trial court improperly denied alternative sentencing, the trial court erred by failing to place weight on two mitigating factors, and the trial court erred by allowing testimony regarding a prior conviction during the sentencing hearing in violation of *Shepard v. United States*, 544 U.S. 13 (2005). The State contends that Appellant was properly sentenced by the trial court.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the presentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "[t]he burden of showing that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (8) the potential for rehabilitation or treatment. T.C.A. §§

40-35-210(a), (b), -103(5); *see also State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

A. Excessive Sentence/Application of Mitigating Factors

Appellant first argues that the trial court "failed to place any weight on the mitigating factors." Appellant submitted two mitigating factors for consideration at trial: (1) that his conduct neither caused nor threatened serious bodily injury; and (2) that he assisted authorities in locating and recovering property or persons involved in the crime. *See* T.C.A. § 40-35-113(1) & (10). Appellant also claims that his sentence is excessive but does not explain why his sentence is excessive.

As stated previously, Appellant committed the offenses herein after the 2005 amendments to the Sentencing Act. "The amended statute no longer imposes a presumptive sentence." *State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). In *Carter*, the supreme court explained that the trial court is free to select any sentence within the applicable range so long as the length of the sentence is:

> "[c]onsistent with the purposes and principles of [the Sentencing Act]." [T.C.A.] § 40-35-210(d). Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," [T.C.A.] § 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," [T.C.A.] § 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," [T.C.A.] § 40-35-103(5).

Id. (footnote omitted).

As a result of the amendments to the Sentencing Act, our appellate review of the weighing of the enhancement and mitigating factors was deleted when the factors became advisory, as opposed to binding, upon the trial court's sentencing decision. *Id.* at 344. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. *Id*. The trial court's weighing of various mitigating and enhancment factors is now left to the trial court's sound discretion. *Id.*

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See id.* at 343; *State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that "the trial court appl[ied] inappropriate mitigating and/or enhancement factors or otherwise fail[ed] to follow the Sentencing Act, the presumption of correctness fails" and our review is de novo. *Carter*, 254 S.W.3d at 345.

Appellant herein was convicted as a Range 1 Standard Offender of conspiracy to deliver 300 pounds or more of marijuana, a Class A felony, and possession of 70 pounds or more of marijuana with the intent to deliver, a Class B felony. T.C.A. § 39-17-417(a)(4)(i)(13) & (j)(13)(A). For the Class A felony, Appellant was subject to a sentence of "not less than fifteen (15) nor more than twenty-five (25) years." T.C.A. § 40-35-112(a)(1). For the Class B felony, Appellant was subject to a sentence of "not less than eight (8) nor more than (12) years." T.C.A. § 40-35-112(a)(2). The trial court sentenced Appellant to twenty-four years for the conspiracy conviction and 10 years for the possession conviction, to be served consecutively to each other, for a total effective sentence of thirty-four years. Appellant has not challenged the application of the enhancement factors, merely the misapplication of mitigating factors. As stated previously, the mitigating factors are merely advisory. We are without authority to adjust a defendant's sentence because of "a trial court's 'fail[ure] to appropriately adjust' a sentence in light of applicable, but merely advisory, mitigating or enhancement factors." *Carter*, 254 S.W.3d at 346. Appellant is not entitled to relief on this issue.

B. Testimony Regarding Prior Conviction

Appellant also complains that the trial court improperly considered testimony at the sentencing hearing from Detective Aaron Thomas about the facts underlying a previous conviction. Appellant argues on appeal that this violates *Shepard*. Specifically, Appellant contends that the trial court was limited to considering the plea papers, indictment or charging document and statutory definitions when assessing the facts of his prior conviction for possession of more than ten pounds of marijuana with the intent to sell in 2000. According to Detective Thomas, Appellant pled guilty to the charge. Detective Thomas testified to the facts that were the basis for the conviction.

In *Shepard*, the United States Supreme Court determined that a sentencing court could only consider the plea agreement, indictments, and statutory definitions when considering a prior offense to which a defendant had entered a guilty plea. *Shepard*, 544 U.S. at 26. The Court was utilizing the Armed Career Criminal Act in *Shepard*. The Court based its decision on both the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the "guarantee a jury's finding of any disputed fact [is] essential to increase the ceiling of a potential sentence." *Shepard*, 544 U.S. at 25. Our Tennessee Supreme Court has discussed *Shepard* in the context of applying aggravating factors in capital cases. *See State v. Rice*, 184 S.W.3d 646 (Tenn. 2006). In *Rice*, the court determined:

> *Shepard* does not change a judge's ability to find the "fact of a prior conviction." It does, however, limit the scope of the judge's inquiry to reliable judicial records regarding the prior conviction and precludes the judge from re-examining the facts underlying that conviction. This is not to say that a judge is limited only to looking at the fact that there was a prior conviction. The judge may look at such things as the charging documents, jury instructions, plea agreements or transcripts of the colloquy between judge and defendant in which the defendant confirms the factual basis for the plea, or bench-trial judges' findings of fact and rulings of law in order to determine if the statutory elements of that prior crime met

> those necessary to establish the aggravating circumstance [prior to submission to the jury for determination of the existence of the aggravating circumstance].

184 S.W.3d at 669. In the case herein, the trial court clearly heard testimony about the facts underlying the prior conviction in violation of the procedure set forth in *Shepard*. However, the trial court clearly only considered the existence of the prior conviction during sentencing. Moreover, the facts of the prior conviction were not submitted to the jury, as complained of in *Shepard*. They were utilized by the trial court in determining the length of Appellant's sentence. Further, Appellant admitted at the sentencing hearing that he began selling marijuana in 1998 and was receiving the drugs from Mexico. It does not appear that the trial court used anything other than the fact of the prior conviction to enhance Appellant's sentence. We determine that any error associated with the additional testimony regarding the facts supporting the prior conviction is harmless. Appellant is not entitled to relief on this issue.

C. Consecutive Sentencing

Appellant insists that his sentences should have been concurrent rather than consecutive. The State disagrees, arguing that the record supports the trial court's finding that Appellant was a professional criminal.

Under Tennessee Code Annotated section 40-35-115(a), if a defendant is convicted of more than one offense, the trial court shall order the sentences to run either consecutively or concurrently. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; . . . .

T.C.A. § 40-35-115(b). When imposing a consecutive sentence, a trial court should also consider general sentencing principles, which include whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn.

2002). The imposition of consecutive sentencing is in the discretion of the trial court. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

In the case herein, the trial court found that consecutive sentencing was warranted, making the following comments:

> The court finds this defendant is a professional criminal. The pre-sentence report indicates he worked nine months on and off in the construction business. He stated he was "pretty good at selling" and told Sergeant McWright that it had been a long time since he had done any roofing. Co-defendant Chavez brought to the defendant's house on five occasions 30-50,000 dollars worth of marijuana. Beginning in 2002, Chavez was bringing the defendant shipments twice a month. At the time of his arrest, the defendant was awaiting 171 pounds of marijuana and had nineteen pounds in his house. Additionally, the plastic wrapping found at his house was similar to the current shipment. Officer Hana asked him if all he did was sell drugs, and the defendant stated, "I do pretty good." As stated previously, the defendant admitted his last shipment had been one hundred and eighty pounds. Further, there was a weapon located at his residence, which the defendant could not legally possess.
>
> . . . .
>
> The Court has found by a preponderance of the evidence that this defendant is a professional criminal who knowingly devoted himself to this criminal activity to serve as his livelihood and whose criminal activity was extensive.

Thus, the trial court relied on subsection (b)(1) of Tennessee Code Annotated section 40-35-115, finding Appellant to be a professional criminal, to justify the imposition of consecutive sentencing. The record supports the trial court's determination. The Appellant himself admitted that he sold as much as 1,000 pounds of marijuana and that he started selling drugs in 1998, nearly seven years prior to the convictions at issue herein. Appellant had a prior conviction for possession of more than ten pounds of marijuana with the intent to sell. Appellant also informed the court that he had at least a dozen people working under him as sellers or dealers. The record does not preponderate against the decision of the trial court. Appellant is not entitled to relief on this issue.

D. Denial of Alternative Sentencing

Lastly, Appellant complains that the trial court denied alternative sentencing. Specifically, Appellant argues that the trial court should have ordered him to serve his sentence on community corrections. The State argues that because Appellant fails to support his brief with argument, the issue is waived. Further, the State argues that Appellant was not statutorily eligible for community corrections because there was a gun recovered from Appellant's home and Appellant acknowledged that he was a felon who was not permitted to have a gun in his home.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders:

> [A]nd who is an especially mitigated offender or standard offender convicted of a Class C D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. . . . A court shall consider, but is not bound by, this advisory sentencing guideline.

T.C.A. § 40-35-102(6); *see also Carter*, 254 S.W.3d at 347. For offenses committed on or after June 7, 2005, a defendant is eligible for probation if the sentence actually imposed is ten years or less. *See* T.C.A. § 40-35-303(a) (2006).

All offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *see also State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial

court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

The trial court herein noted that Appellant was ineligible for probation as to Count One, because it is a Class A felony. Appellant sought an alternative sentence under the provisions of Community Corrections. Tennessee Code Annotated section 40-36-106 provides, in pertinent part:

> (a)(1) An offender who meets all of the following minimum criteria shall be considered eligible for punishment in the community under the provisions of this chapter:
>
> (A) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (B) Persons who are convicted of property-related, or drug- or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
>
> (C) Persons who are convicted of nonviolent felony offenses;
>
> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (F) Persons who do not demonstrate a pattern of committing violent offenses;
>
> . . . .

The trial court herein denied a community corrections sentence pursuant to *State v. Grandberry*, 803 S.W.2d 706 (Tenn. Crim. App. 1990), because a weapon was involved in violation of Tennessee Code Annotated section 40-36-106(a)(1)(D).

In *Grandberry*, this Court determined that the defendant was ineligible for community corrections after being convicted of possession of cocaine and marijuana with the intent to sell. Police found drugs, cash and two guns in two residences that were maintained by the defendant. *Grandberry*, 803 S.W.2d at 707-08. The Court in *Grandberry* held that the defendant was convicted of felony offenses in which the use or possession of a weapon was involved; therefore, he was ineligible for community corrections. *See id.* at 708. Similarly, in *State v. Timothy W. Brown*, No. 01-C-01-9211-CC00343, 1994 WL 284016 (Tenn. Crim. App., at Nashville, June 9, 1994), a panel of this Court held that the defendant was ineligible for community corrections because he testified that he was a cocaine dealer who carried a pistol to defend himself. *Timothy W. Brown*, 1994 WL 284016, at *5. Finally, in *State v. Frederick Tennial*, No. 02C01-9106-CR-00123, 1992 WL 105975 (Tenn. Crim. App., at Jackson, May 20, 1992), this Court held that the defendant, who pled guilty to selling and possessing cocaine, was ineligible for community corrections based on the police

finding a loaded .45 pistol in his car. *State v. Frederick Tennial*, 1992 WL 105975, at *2. The defendant admitted that he sold cocaine two or three times a week for a year to a year and a half. *Id.* at *1. He also admitted that drug dealers normally carry guns. *Id.*

This case is distinguishable from *Grandberry*, *Brown*, and *Tennial*. The authorities herein found a weapon in Appellant's house when it was searched. He claimed that it belonged to his fiancee′. There is no evidence in the record that the gun had any relationship to the drug activity for which Appellant was convicted. In each of these cases, the defendants' possession of weapons was clearly connected to the felony offenses for which they were convicted. In the case herein, no such connection was shown. Accordingly, the trial court improperly denied community corrections on the basis that Appellant was convicted of a crime which involved the use or possession of a weapon.

Despite that error, we determine that the trial court properly denied an alternative sentence. The trial court also determined that Appellant was "not amenable to treatment and/or rehabilitation based on the extensive nature of his involvement in illegal drug activities" and that Appellant did "not recognize [his] extensive involvement and impact in illegal activity." As a result, the trial court felt that confinement was necessary to avoid depreciating the seriousness of the offense and to provide a deterrence to others. *See* T.C.A. 40-35-103(1)(B). This is a legitimate reason for the denial of an alternative sentence. *See State v. Trotter*, 201 S.W.3d 651, 653-54 (Tenn. 2006). While Appellant qualified for a community corrections sentence, he was not entitled to be considered a favorable candidate for an alternative sentence because he was convicted of a Class A and a Class B felony. *See* T.C.A. 40-35-102(6). Appellant admitted that he sold large quantities of marijuana and began smoking marijuana at the age of thirteen. He had a prior conviction for possession of marijuana with intent to sell. The record supports the trial court's denial of alternative sentencing. Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

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JERRY L. SMITH, JUDGE